

TOWN OF KITTERY, MAINE
PLANNING BOARD MEETING
Council Chambers

APPROVED
July 11, 2013

Meeting called to order at 6:05 p.m.

Board Members Present: Tom Emerson, Susan Tuveson, Bob Melanson, Mark Alesse, Rich Balano

Members absent: Deborah Driscoll, Ann Grinnell

Staff: Gerry Mylroie, Planner; Chris DiMatteo, Assistant Planner

Pledge of Allegiance

Minutes: June 27, 2013

Minutes were deferred

Public Comment:

Public comment and opinion are welcome during this open session. However, comments and opinions related to development projects currently being reviewed by the Planning Board will be heard only during a scheduled public hearing when all interested parties have the opportunity to participate.

There were no public comments.

ITEM 1 – Sowerby Mixed Use Development, Route One – Modification to an Approved Plan.

Action: Approve Site Walk minutes, Grant or deny plan approval. Owner David Sowerby and applicant Mark Patterson, Patco Construction, is requesting approval to amend previously approved 2008 Site & Subdivision Plan to allow the use of on-site septic and well for residential lots rather to be required to connect to public sewer and water. The 6 lots are located along Adams Road, Tax Map 60, Lots 24-1 through 24-6 in the Residential Rural Zone. Agent is Ken Wood, Attar Engineering, Inc.

Mark Dow [unclear], Patco Construction, explained Ken Wood was unavailable, and he was available to answer questions.

Mr. Mylroie stated a site walk was held, referencing the site walk notes. He explained the Board's review is to determine whether they will allow on-site septic and well connections instead of municipal services, and to extend the approval period for the plan.

The Public Hearing opened at 6:10 p.m.

Steve Hall, Kittery Conservation Commission, noted the pond located on lot 6, and requested the pond be included in the hotel parcel and not to remain in the residential lot.

Dave Sowerby, owner, stated he felt the ownership of the pond by a resident makes more sense.

The Public Hearing closed at 6:12 p.m.

Mr. Balano opened the discussion regarding the 1,000-foot sewer connection and why connection is not feasible, beyond the costs.

Mr. Sowerby stated he paid for the sewer along Route 1 to connect to the mixed use portion; however the economy has negatively impacted this, with only one prospective buyer in six years, for the residential portion. He noted only one Board member attended the site walk, explaining it is a very long distance to run the sewer lines through ledge, and would be very costly.

Mr. Balano summarized the ordinance requires connection to municipal sewer, and the Board needs to determine what makes this unfeasible.

Mr. Dow explained they want to be able to market the homes in the \$260-\$300,000 range. Running the sewer lines for this market range is very costly compared to areas with more expensive homes, raising the

cost by \$20,000 per lot, or 10% of the total costs. The location is a challenge as it is close to I-95, so the expenses need to be contained.

Mr. Alesse asked if the ledge poses a problem for the septic systems as well.

Mr. Dow stated they have conducted test pits and modern systems can be placed to meet state standards, and systems will be placed in the front of the lots with fill as needed. Wells will be placed behind the homes to meet the required distances from septic systems.

Mr. Alesse stated the Board has been tasked to follow the ordinance and reduce the granting of waivers. He felt a 10% increase is not prohibitive, and the benefits to municipal sewer and water seem to outweigh the maintenance needs of a septic system and wells.

Mr. Dow stated in this particular situation the waivers allow flexibility in the Board's decision on a case by case basis.

Mr. Melanson asked Bill Straub, CMA Engineers, to address the Board.

Mr. Straub explained the technical issues and ordinance requirements are clear, and the Board must weigh these issues in their decision.

Mr. Balano asked what the cost difference is between the septic system requirements and the sewer connections.

Mr. Dow stated the additional \$20,000 per lot is above the costs of installing a septic system and well, and adds an additional \$100-\$120 per month to a mortgage payment, which can make these lots unaffordable to the average worker in Kittery.

Ms. Tuveson stated it appears the land costs in this case makes the development unaffordable, as the Board must apply ordinance standards and only waive them on a case by case basis.

Mr. Melanson asked about the time extension for the development.

Mr. DiMatteo explained the applicant would need to request an extension, not to exceed 10 years from the original date of approval.

Mr. Melanson moved to grant a 5 year extension to the project.

Ms. Tuveson seconded

Mr. Mylroie explained the application was approved May 22, 2008, so an extension not exceeding 10 years would be May 22, 2018.

Mr. Melanson amended his motion to grant an extension not to exceed 10 years from the approval date of May 22, 2008.

Ms. Tuveson seconded

Motion carried unanimously

Mr. Mylroie asked if there are other variable costs that could be adjusted to make the project feasible for the developer and the potential buyers.

Mr. Dow explained the \$240,000 price point equates to a home price of \$125,000, including the septic and well systems. This area of Kittery, York and Eliot are some of the highest in the country. Over 50% of the cost is the land expenses. The second highest employer in Sanford is the Shipyard, indicating the lack of affordable housing in this area. A waiver would help provide affordable housing to local workers, as well as increased density construction and smaller lot sizes for single family homes.

Mr. Emerson suggested in 2008 the project may have been affordable, but in 2013 it is not, though it may be in 2018. The Board must determine a developer is financially capable. The town is planning to extend sewer lines and waiver requests will be made and must be considered on a case by case basis.

Mr. Balano moved to approve the final plan and read the Findings of Fact.

Mr. Melanson seconded

Mr. Alesse stated he is uncomfortable with the waiver request and asked where the Board would deny the request within the Findings.

Mr. DiMatteo explained the first standard requires code conformance. The Board would then determine whether the waiver request is feasible through the findings, and voting to determine whether each

standard has been met. Mr. Mylroie suggested the Board could move to accept or deny the waiver request and then proceed with the findings. Discussion followed regarding the process for review of the modified plan findings.

The motion carried with 4 in favor, 1 against (Alesse) and 0 abstentions

WHEREAS: Owner David Sowerby and applicant Mark Patterson, Patco Construction, is requesting approval to amend a previously approved 2008 Site & Subdivision Plan to allow the use of on-site septic and well for residential lots rather than be required to connect to public sewer and water. The 6 lots are located along Adams Road, Tax Map 60, Lots 24-1 through 24-6 in the Residential Rural Zone. Agent is Ken Wood, Attar Engineering, Inc.

Hereinafter the “Development”.

Pursuant to the Plan Review meetings conducted by the Planning Board as duly noted; and pursuant to the Project Application and Plan and other documents considered to be a part of the approval by the Planning Board in this finding consist of the following (Hereinafter the “Plan”).

- | | |
|---|---|
| 1. Application: Site Plan Amendment to an Approved Plan | May 21, 2013 |
| 2. Site & Subdivision Amendment #1 | May 1, 2013 – Attar Engineering, Inc. |
| 3. Subdivision Plan for DSS Land Holdings, LLC
Inc. | 9/14/2007– Anderson Livingston Engineers, |
| 4. Site & Subdivision Plan, Sowerby Parcel
with Planning Board Chairman signature dated August 1, 2008 | 11/08/06, Revised: April 9, 2008 |

NOW THEREFORE, based on the entire record before the Planning Board as and pursuant to the applicable standards in the Land Use and Development Code, the Planning Board makes the following factual findings as required by Section 16.10.8.3.4. and as recorded below:

FINDINGS OF FACT

Action by the board shall be based upon findings of fact which certify or waive compliance with all the required standards of this title, and which certify that the development satisfies the following requirements:

A. Development Conforms to Local Ordinances.

The proposed development conforms to a duly adopted comprehensive plan as per adopted provisions in the Town Code, zoning ordinance, subdivision regulation or ordinance, development plan or land use plan, if any. In making this determination, the municipal reviewing authority may interpret these ordinances and plans.

Applicant wishes approval to develop the residential portion of a site and subdivision plan approved May 22, 2008. The following extension was granted by the Planning Board on April 23, 2009:

moved that the Board extend the time period for initiation of the project to three (3) years from the original approval date of August 1, 2008, with the deadline for completion of the project be changed to five (5) years from the original date of approval.

Based on this motion, the project will need to be completed by August 1, 2013. Should the Board approve the current request, the Applicant will need another extension to complete the project. The Board may grant extensions up to 10 years from the original approval date. (Note: The original approval date was May 22, 2008. The date referenced in the 2009 motion for extension was the date the approved plan was signed by the Chairman. See copy of approved plan in application).

Applicant is requesting that on site sewer and septic systems be approved for the residential lots along Adams Drive instead of requiring connections to municipal and sewer lines. Note #7 on approved 2008 plan: *This project will be serviced by municipal sewer. The residential lots will utilize an E/One or approved equal low pressure grinder pump sewer system that shall be privately owned and maintained, as well as the associated portions of the force main system.* Note #8 on approved 2008 plan: *This project will be serviced by the Kittery Water District.*

Per CMA:

- 16.8.6.1. B Provides that if the Board determines that if *"service to each lot by a public water system is not feasible"* then it may allow that individual wells. In this case, service of public water is readily available along Adams Road. One what basis would the Board consider that service by public water is not feasible? Such a conclusion would be necessary to waive the requirement.
- 16.8.7.3 Provides that *"where a public sewer line is located within 1000feet of the proposed development ... the developer must connect with such sanitary sewer line as required by the sewer department.."*. The existing public sewer is well within 1000 feet of all the proposed lots, and a design was approved by the Kittery Sewer Department in 2008 for service to these lots. The sewer department has recently expressed concerns about the possibility of these lots having on-site septic systems in lieu of public sewer service. On what basis would the Board consider that service by on-site septic systems? Such a conclusion would be necessary to waive the requirements.

Vote of 0 in favor 5 against 0 abstaining

B. Freshwater Wetlands Identified.

All freshwater wetlands within the project area have been identified on any maps submitted as part of the application, regardless of the size of these wetlands.

A wetland area and pond is identified on Lot #6. Per 2008 conditions of approval:

6. *Prior to the sale of Lots 2, 3 and 6, the Owner/Developer of said lots must, as part of the purchase and sale agreement, prepare a rider to the deed that indicates the owner(s) of Lot 2, 3 and 6 must bear the responsibility to protect and maintain the conservation land area.*

Vote of 5 in favor 0 against 0 abstaining

C. River, Stream or Brook Identified.

Any river, stream or brook within or abutting the proposed project area has been identified on any maps submitted as part of the application. For purposes of this section, "river, stream or brook" has the same meaning as in 38 M.R.S. §480-B, Subsection 9.

The Board finds this standard is not applicable.

Vote of 5 in favor 0 against 0 abstaining

D. Water Supply Sufficient.

The proposed development has sufficient water available for the reasonably foreseeable needs of the development.

Not determined. The applicant is proposing to install wells on each residential lot, and well exclusion zones have been identified. The 2008 approval (Note #8) noted lots would connect to municipal water supply.

Vote of 5 in favor 0 against 0 abstaining

E. Municipal Water Supply Available.

The proposed development will not cause an unreasonable burden on an existing water supply, if one is to be used.

The applicant is proposing to install wells on each residential lot. The 2008 approval (Note #8) stated lots would connect to the municipal water supply.

Vote of 5 in favor 0 against 0 abstaining

F. Sewage Disposal Adequate.

The proposed development will provide for adequate sewage waste disposal and will not cause an unreasonable burden on municipal services if they are utilized.

The applicant is proposing to install septic systems on each residential lot, and locations have been determined to meet

state requirements. The 2008 approval (Note #7) stated lots would connect to municipal sewer services.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
G. Municipal Solid Waste Disposal Available.
<i>The proposed development will not cause an unreasonable burden on the municipality's ability to dispose of solid waste, if municipal services are to be used.</i>
This standard was addressed for approval in 2008.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
H. Water Body Quality and Shoreline Protected.
<i>Whenever situated entirely or partially within two hundred fifty (250) feet of any wetland, the proposed development will not adversely affect the quality of that body of water or unreasonably affect the shoreline of that body of water.</i>
The Board finds this standard is not applicable.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
I. Groundwater Protected.
<i>The proposed development will not, alone or in conjunction with existing activities, adversely affect the quality or quantity of groundwater.</i>
Applicant is proposing on-site septic systems. Per CMA: We note that of the 18 test pits reported to support possible septic system design, that 7 reported less than 20 inches of soil over bedrock. If the Board does consider allowing septic systems, it should request the applicant to describe the nature of the likely septic system designs, including which would use conventional designs, and which would require pumping to mounded leach fields or other measures.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
J. Flood Areas Identified and Development Conditioned.
<i>All flood-prone areas within the project area have been identified on maps submitted as part of the application based on the Federal Emergency Management Agency's Flood Boundary and Floodway Maps and Flood Insurance Rate Maps, and information presented by the applicant. If the proposed development, or any part of it, is in such an area, the applicant must determine the one hundred (100) year flood elevation and flood hazard boundaries within the project area. The proposed plan must include a condition of plan approval requiring that principal structures in the development will be constructed with their lowest floor, including the basement, at least one foot above the one hundred (100) year flood elevation.</i>
The Board finds this standard is not applicable. Property is outside of the flood plain
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
K. Stormwater Managed.
<i>Stormwater Managed. The proposed development will provide for adequate stormwater management</i>
Prior 2008 approval included adequate stormwater management. Current stormwater management guidelines will be followed.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
L. Erosion Controlled.
<i>The proposed development will not cause unreasonable soil erosion or a reduction in the land's capacity to hold water so that a dangerous or unhealthy condition results.</i>
The standard will be met. A note will be included on the plan stating the applicant's contractor will follow MDEP best management practices for erosion and sediment control (silt fencing, silt sacks, etc.), and CMA engineers will be

notified to observe application during construction.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
M. Traffic Managed. <i>The proposed development will:</i> <ol style="list-style-type: none">1. Not cause unreasonable highway or public road congestion or unsafe conditions with respect to the use of the highways or public roads existing or proposed; and2. Provide adequate traffic circulation, both on-site and off-site.
The standard was addressed and supported in the approval of 2008.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
N. Water and Air Pollution Minimized. <i>The proposed development will not result in undue water or air pollution. In making this determination, the following must be considered:</i> <ol style="list-style-type: none">1. Elevation of the land above sea level and its relation to the floodplains;2. Nature of soils and sub-soils and their ability to adequately support waste disposal;3. Slope of the land and its effect on effluents;4. Availability of streams for disposal of effluents;5. Applicable state and local health and water resource rules and regulations; and6. Safe transportation, disposal and storage of hazardous materials.
<ol style="list-style-type: none">1. The development is located outside of FEMA designated floodplains.2. Septic test pits and secondary pits have been identified. <p>Per CMA: We note that of the 18 test pits reported to support possible septic system design, that 7 reported less than 20 inches of soil over bedrock. If the Board does consider allowing septic systems, it should request the applicant to describe the nature of the likely septic system designs, including which would use conventional designs, and which would require pumping to mounded leach fields or other measures.</p> <p>3 thru 6. The Board finds these standards are not applicable to this development.</p>
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
O. Aesthetic, Cultural and Natural Values Protected. <i>The proposed development will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, significant wildlife habitat identified by the department of inland fisheries and wildlife or the municipality, or rare and irreplaceable natural areas or any public rights for physical or visual access to the shoreline.</i>
The standard was addressed and supported in the approval of 2008. Property is not located near any protected/significant aesthetic, cultural or natural areas. The Board finds this standard is not applicable.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
P. Developer Financially and Technically Capable. <i>Developer is financially and technically capable to meet the standards of this section.</i>
<p>From 5/22/13 letter from Attar Engineering: <i>Applicant (Mark Patterson, Patco Construction) has a Purchase and Sales Agreement for the six residential lots and is the only prospective buyer since the lots were offered for sale in 2005. This sale will be finalized only if the amendment is approved.</i></p> <p>From Mark Patterson: <i>I am of the opinion that if we do not get the approvals for septic and well, we would not be interested in acquiring the property. The development costs would put the home packages substantially above the current market in that area.</i></p>
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining

NOW THEREFORE the Kittery Planning Board adopts each of the foregoing Findings of Fact and based on these Findings determines the proposed Development will have no significant detrimental impact, and the Kittery Planning Board hereby grants Preliminary and Final Approval for the Development at the above referenced property, including any waivers granted or conditions as noted.

Waivers:

1. 16.8.6.1. B - "service to each lot by a public water system is not feasible"
2. 16.8. 7. 3 – Public Sewer Connection Required: "where a public sewer line is located within 1000 feet of the proposed development ... the developer must connect with such sanitary sewer line as required by the sewer department.."

Vote of 0 in favor 5 against 0 abstaining

Conditions: (All conditions and waivers granted must be included on the final plan prior to signature by the Planning Board Chairman)

1. All conditions as noted on the May 22, 2008 approved plan shall remain in effect unless so waived and included herein.
2. No changes, erasures, modifications or revisions may be made to any Planning Board approved final plan, unless in accordance with the Planner's and CEO's powers and duties as found in Chapter 16.4, or unless the plan has been resubmitted and the Planning Board specifically approves such modifications. In the event a final plan is recorded without complying with this requirement, the same is null and void, and the Planning Board must institute proceedings to have the plan stricken from Town records and the York County Registry of Deeds. (Title 16.10.9.1.2)
3. Date of Planning Board approval shall be included on the final plan in the Signature Block.

The Planning Board accepts the above *Findings of Fact* as read, *Application Waivers* and *Conditions of Approval* if any, and approves the proposed *Development* and authorizes the Planning Board Chairman to sign the Final Plan and Findings of Fact after the said conditions have been met.

Vote of 5 in favor 0 against 0 abstaining

Per Title 16.6.2.A - An aggrieved party with legal standing may appeal a final decision of the Planning Board to the York County Superior Court in accordance with Maine Rules of Civil Procedures Section 80B, within forty-five (45) days from the date the decision by the Planning Board was rendered.

ITEM 2 – Knutel/56 Chauncey Creek Road – Shoreland Development Plan Review

Action: Approve Site Walk minutes, Grant or deny plan approval. Owner and applicant Philip Knutel is requesting approval of their plans to expand an existing non-conforming building located on Chauncey Creek Rd., Tax Map 44, Lot 55, in the Kittery Point Village and Shoreland Overlay zones. Agent is Architect Tom Emerson, Studio B-E.

Chairman Emerson stepped down to present the application to the Board. Vice-Chairman Tuveson assumed the chair.

Mr. Balano moved to approve the site walk minutes

Mr. Alesse seconded

Motion carried by all members present

Tom Emerson explained the property has existing nonconformities, the proposed expansion does not create greater non-conformities and are less than the allowed 30% life-time expansion in volume and square footage.

There were no questions of the applicant's agent.

The Public Hearing opened and closed at 7:12 p.m. as there were no persons wishing to provide testimony.

Mr. Melanson moved to approve the plan application for 56 Chauncey Creek Road application and read the Findings of Fact.

Mr. Balano seconded

Motion carried with 4 in favor, 0 against and 0 abstentions

WHEREAS: Owner and applicant Philip Knutel is requesting approval of plans to expand an existing non-conforming building located at 56 Chauncey Creek Rd., Tax Map 44, Lot 55, in the Kittery Point Village and Shoreland Overlay zones.

Hereinafter the "Development".

Pursuant to the Plan Review meetings conducted by the Planning Board as duly noted; and pursuant to the Project Application and Plan and other documents considered to be a part of the approval by the Planning Board in this finding consist of the following (Hereinafter the "Plan").

1. Shoreland Overlay Zone Project Plan Review Application, dated 5/19/13.
2. Annotated survey plan entitled; *Standard Boundary Survey and Site Plan for Property at 56 Chauncey Creek Road, Kittery Point, York County, Maine owned by Phillip Gerard Knutel, 56 Chauncey Creek Road, Kittery Point Maine, 03905* dated April 23, 2013.
3. Architectural drawings prepared by *Studio B-E Design Consulting* (no dates):
 - Sheet 1 - Basement Plan
 - Sheet 2 – First Floor Plan
 - Sheet 3 – Second Floor Plan
 - Sheet 4 – Back Elevation
 - Sheet 5 – Side Elevation

NOW THEREFORE, based on the entire record before the Planning Board and as pursuant to the applicable standards in the Land Use and Development Code, the Planning Board makes the following factual findings:

FINDINGS OF FACT

I. Standards in the Shoreland Overlay Zone

Chapter 16.3 LAND USE ZONE REGULATIONS have been met.

16.3.2.17. D Shoreland Overlay Zone - Standards.
Vote: <u>4</u> in favor <u>0</u> against <u>0</u> abstaining

II. Standards in the Shoreland Overlay Zone

Chapter 16.7 GENERAL DEVELOPMENT REQUIREMENTS have been met

16.7.3.1 Prohibitions and Allowances.
A. <i>Except as otherwise provided in this Article, a non-conforming condition must not be permitted to become more non-conforming.</i>
The proposed additions are no closer than the existing structure to the protected resource.
16.7.3.6 Nonconforming Structures in Shoreland and Resource Protection Zones.
16.7.3.6.1 Expansion.
There were no expansions after January 1, 1989. Total expansion for this proposal is less than 30%.

The proposed addition (architectural sheets 1-3), located on the northwest side of the existing structure, is within the 15-foot side yard setback requirement. The relocated and expanded bulkhead located on the northeast side of the existing structure does not extend beyond the existing bulkhead location.

Vote: 4 in favor 0 against 0 abstaining

III. Procedures for Administering Permits for Shoreland Development Review

16.10.10.2 D. An Application will be approved or approved with conditions if the reviewing authority makes a positive finding based on the information presented. It must be demonstrated that the proposed use will:

1. *maintain safe and healthful conditions;*

The proposed development does not appear to have an adverse impact.

Vote: 4 in favor 0 against 0 abstaining

2. *not result in water pollution, erosion or sedimentation to surface waters;*

The proposed development does not appear to have an adverse impact. See Conditions of Approval #3.

Vote: 4 in favor 0 against 0 abstaining

3. *adequately provide for the disposal of all wastewater;*

Vote: 4 in favor 0 against 0 abstaining

4. *not have an adverse impact on spawning grounds, fish, aquatic life, bird or other wildlife habitat;*

Vote: 4 in favor 0 against 0 abstaining

5. *conserve shore cover and visual, as well as actual, points of access to inland and coastal waters;*

Vote: 4 in favor 0 against 0 abstaining

6. *protect archaeological and historic resources;*

Vote: 4 in favor 0 against 0 abstaining

7. *not adversely affect existing commercial fishing or maritime activities in a commercial fisheries/ maritime activities district;*

Vote: 4 in favor 0 against 0 abstaining

8. *avoid problems associated with floodplain development and use*

Vote: 4 in favor 0 against 0 abstaining

9. *is in conformance with the provisions of this Code; and*

The proposed addition appears to be in conformance to the Town Code, see sections I and II above. A Planning Board approval block needs to be included on the final plan. The Standard Boundary Survey certification needs to be signed and dated.

Vote: 4 in favor 0 against 0 abstaining

10. *recorded with the York County Registry of Deeds.*

Vote: 4 in favor 0 against 0 abstaining

NOW THEREFORE the Kittery Town Planning Board adopts each of the foregoing Findings of Fact and based on these Findings determines the proposed development will have no significant detrimental impact, contingent upon the following condition(s):

Application Waivers: None

Conditions of Approval: (Conditions of Approval must be included on the final plan prior to signature and recording)

1. Existing stone walls to be removed and relocated as shown on the approved plan.
2. Volume, floor area and impervious area and percent increases calculations for the property shall be included on the plan prior to signature and recording.
3. Maine DEP *Best Management Practices* notes for all work associated with site and building renovations to ensure adequate erosion control and slope stabilization shall be included on the plan prior to signature and recording.
4. No changes, erasures, modifications or revisions may be made to any Planning Board approved final plan, unless in accordance with the Planner's and CEO's powers and duties as found in Chapter 16.4, or unless the plan has been resubmitted and the Planning Board specifically approves such modifications. In the event a final plan is recorded without complying with this requirement, the same is null and void, and the Planning Board must institute proceedings to have the plan stricken from Town records and the York County Registry of Deeds. (Title 16.10.9.1.2)
5. All Notices to Applicant included in the Findings of Fact.

Move to accept the above *Findings of Fact* as read, including *Conditions of Approval*, and approve the proposed *Development* in the Shoreland Overlay Zone on property located at 56 Chauncey Creek Rd., Tax Map 44, Lot 55, in the Kittery Point Village and Shoreland Overlay zones, and authorize the Planning Board Vice-Chairman to sign the Final Plan and Findings of Fact.

Vote: 4 in favor 0 against 0 abstaining

Approved by the Kittery Planning Board on July 11, 2013

Title 16.6.2 An aggrieved party with legal standing may appeal a final decision of the Planning Board to the York County Superior Court in accordance with Maine Rules of Civil Procedures Section 80B, within forty-five (45) days from the date the decision by the Planning Board was rendered.

OLD BUSINESS

ITEM 3 – Clayton Lane Subdivision - Modification to an Approved Plan.

Action: Review subdivision plan, grant or deny final approval. Josh Abbott, owner and applicant proposes to amend the previously approved 4-lot subdivision located off Remicks Lane (Clayton Lane) by dividing two lots, thereby creating 6-lots, and adding two duplexes, yielding a total of 9 dwelling units. The site is identified as Tax Map 65 Lot 12, ±21.4 acres in the Residential - Rural (R-RL) Zone. Agent is Ken Markley, Easterly Surveying, Inc.

Ken Markley noted the changes requested by the Board at preliminary approval and minor peer review changes have been made. Applicant is requesting the mitigation fee be waived as the wetland crossing is a man-made wetland. Mitigation fees are used to aid in the preservation of wetlands, the purchase of open space and to provide assistance to the Kittery Land Trust. The applicant is disturbing 800 sf of wetland area, but is providing 10.5 acres of open space, preserving 4.5 wetland acres, and donating 8.13 acres to the Kittery Land Trust. In the prior subdivision application, the applicant also provided 10,000 sf of upland mitigation area.

Mr. DiMatteo stated staff had recommended the cemetery area be included in the preserved open space. By state statute there is a minimum 25 foot setback for construction, and staff now recommends they preserve a minimum 25-foot no-cut, no disturb buffer around the cemetery area. Mr. Markley stated the applicant would be amenable to this condition.

Ms. Tuveson asked about the proposed septic and well on lot 4B. Mr. DiMatteo stated the Sewer Superintendent explained the existing individual lines cannot be further connected to sewer system. The street waiver request is reasonable as the increase results in only a few additional trips. Mr. Balano noted a discrepancy in scale on the plans. This will be corrected.

Mr. Melanson moved the Clayton Lane modification to an approved plan be approved and read the Findings of Fact
Ms. Tuveson seconded
Motion carried by all members present

Findings of Fact

WHEREAS: Josh Abbott, owner and applicant of Clayton Lane Subdivision, proposes amend the previously approved 4-lot subdivision located off Remicks Lane (Clayton Lane) by dividing two lots, thereby creating 6-lots, and adding two duplexes, yielding a total of 9 dwelling units. The site is identified as Tax Map 65 Lot 12, ±21.4 acres in the Residential - Rural (R-RL) Zone. Agent is Ken Markley, Easterly Surveying, Inc..

Hereinafter the “Development”.

Pursuant to the Plan Review meetings conducted by the Planning Board as duly noted; and pursuant to the Project Application and Plan and other documents considered to be a part of the approval by the Planning Board in this finding consist of the following (Hereinafter the “Plan”), prepared by . Easterly Surveying, Inc (or as noted):

1. Previously Approve Subdivision Plan Set entitled:
Clayton Lane Subdivision, Kittery, Maine REV Date: 9/14/2011
2. Subdivision Plan Set entitled:
Cluster Amendment to Clayton Lane Subdivision, Kittery, Maine REV Date: 6/13/2013
3. Wetland Alteration Plan entitled:
Wetland Alteration Plan for property at Clayton Lane, Kittery, Maine Date: 5/1/2013
4. Submitted application, cover letters and associated documentation:

NOW THEREFORE, based on the entire record before the Planning Board as and pursuant to the applicable standards in the Land Use and Development Code, the Planning Board makes the following factual findings as required by Section 16.10.8.3.4. and as recorded below:

FINDINGS OF FACT

Action by the board shall be based upon findings of fact which certify or waive compliance with all the required standards of this title, and which certify that the development satisfies the following requirements:	
A. Development Conforms to Local Ordinances.	Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
B. Freshwater Wetlands Identified.	
The standard appears to be met.	Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
C. River, Stream or Brook Identified.	
Not applicable.	Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
D. Water Supply Sufficient. <i>The proposed development has sufficient water available for the reasonably foreseeable needs of the development.</i>	Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining

E. Municipal Water Supply Available. (WAIVER REQUIRED FROM 16.8.6.1 WATER SUPPLY SERVICE REQ.) <i>The proposed development will not cause an unreasonable burden on an existing water supply, if one is to be used.</i>
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
F. Sewage Disposal Adequate. <i>The proposed development will provide for adequate sewage waste disposal and will not cause an unreasonable burden on municipal services if they are utilized.</i>
The standard appears to be met.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
G. Municipal Solid Waste Disposal Available.
The standard appears to be met.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
H. Water Body Quality and Shoreline Protected.
The standard appears to be met.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
I. Groundwater Protected.
The standard appears to be met.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
J. Flood Areas Identified and Development Conditioned.
The standard appears to be met. The property does not lie within the floodplain.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
K. Stormwater Managed.
The standard appears to be met.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
L. Erosion Controlled.
The standard appears to be met.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
M. Traffic Managed
The standard appears to be met. Existing Street Width Design is not met with the increase of the proposed dwelling units (from 6 to 9). Any trip ends per day over 72 and less than 200 requires the same standards for a public minor street. Applicant has provided information to support the waiver.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
N. Water and Air Pollution Minimized.
The standard appears to be met.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
O. Aesthetic, Cultural and Natural Values Protected.
The standard appears to be met. See Condition #7.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
P. Developer Financially and Technically Capable.

The standard appears to be met.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining

WETLAND ALTERATION FINDINGS OF FACT
<i>16.9.3.7 Wetlands Alteration Approval Criteria</i>
<i>A. In making the final determination as to whether a wetland application should be approved, the Planning Board will consider existing wetland destruction and the cumulative effect of reasonably anticipated future uses similar to the one proposed.</i>
The standard appears to be met.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
<i>B. It is the responsibility and burden of the applicant to show that the proposed use meets the purposes of this Code and the specific standards listed below to gain Planning Board approval to alter a wetland.</i>
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
<i>C. In evaluating the proposed activity, the Planning Board may need to acquire expert advisory opinions.</i>
The standard appears to be met. The proposed activity has been reviewed by CMA Engineers.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
<i>D. When the Planning Board finds the demonstrated public benefits of the project as proposed, or modified, clearly outweigh the detrimental environmental impacts, the Planning Board may approve such development, but not prior to granting approval of a reasonable and practicable mitigation plan, (see Section 16.9.3.9) and not prior to the completion of all performance guaranties for the project, (see Section 16.10.8.2.2).</i>
The standard appears to be met.
<i>E. The applicant must submit applicable documentation that demonstrates there is no practicable alternative to the proposed alteration of the wetland.</i>
The standard appears to be met.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining
<i>F. In determining if the proposed development plan affects no more wetland than is necessary the Planning Board will consider if the alternatives discussed above in subsection A of this section accomplish the following project objectives:</i>
The standard appears to be met.
Vote of <u>5</u> in favor <u>0</u> against <u>0</u> abstaining

NOW THEREFORE the Kittery Planning Board adopts each of the foregoing Findings of Fact and based on these Findings determines the proposed Development will have no significant detrimental impact, and the Kittery Planning Board hereby grants Preliminary and Final Approval for the Development at the above referenced property, including any waivers granted or conditions as noted.

Waivers:

1. Title 16.8.6.1 Water Supply Service Required
2. Title 16.8.4 Table 1, *Design and Construction Standards...Street Width Design.*
3. Title 16.9.3.7.D. Wetland Preservation Fee

Conditions: (All conditions must be included on the final plan prior to signature by the Planning Board Chairman)

1. Final Plan must include notes that reflect adherence to the Maine DEP *Best Management Practices* for all work associated with site and building renovations to ensure adequate erosion control and slope stabilization.
2. Prior to the commencement of grading and/or construction within a building envelope, as shown on the Plan, the owner and/or developer must stake all corners of the envelope. These markers must remain in place until the Code Enforcement Officer (CEO) determines construction is completed and there is no danger of damage to areas that are, per Planning Board approval, to remain undisturbed.
3. Prior to the CEO issuing a Certificate of Occupancy the open space denoted on the plan as *Conservation Parcel* must be conveyed to the Kittery Land Trust.
4. Revise plan note #11 to include the proposed area of wetlands filling as described in the wetlands alteration narrative (800 square feet).
5. Amend plan note #12 to read: “The stone walls on parcels #1, #2B, and #4B are to be left undisturbed, except in the limited area adjacent to required utility/septic work, where stone wall must be rebuilt, and if not feasible, used in associated landscaping.”
6. Revise Plan to indicate that Lot 2B will connect to existing water main in Remicks Lane.
7. Revise Plan to indicate the existing cemetery, and the 25-foot setback area that is required by MRSA §1371-A, be designated a ‘no cut no disturb buffer zone’.
8. No changes, erasures, modifications or revisions may be made to any Planning Board approved final plan. See Title 16.10.9.1.2.

The Planning Board authorizes the Planning Board Chairman to sign the Final Plan and the Findings of Fact upon confirmation of compliance with any conditions of approval and incorporate these Findings into the minutes..

APPROVED BY THE KITTERY PLANNING BOARD ON July 11, 2013

Vote of 5 in favor 0 against 0 abstaining

Title 16.6.2 An aggrieved party with legal standing may appeal a final decision of the Planning Board to the York County Superior Court in accordance with Maine Rules of Civil Procedures Section 80B, within forty-five (45) days from the date the decision by the Planning Board was rendered.

Break

ITEM 4 – Yankee Commons Mobile Home Park Expansion – Subdivision Preliminary Plan Review.

Action: Continue Review of Preliminary Plan Application. Stephen A. Hynes, Trustee, owner, proposes to expand the adjacent Yankee Commons Mobile Home Park to create 79 sites on 50 acres. Property is located off Idlewood Lane/U.S. Route 1, Map 66 Lots 24, Mixed Use (MU) Zone. Agent is Tom Harmon, PE, Civil Consultants.

Mr. Mylroie explained applicant has stated they do not wish to revise the preliminary plan so the Board’s action would be to deny the plan.

Mr. Balano stated the enclosed findings are not the full findings received and believes the Board should review the entire findings and standards prior to making a decision. Mr. Tuveson agreed, noting the review of findings should be consistent in fairness to the applicant and to assure the Board has followed procedure in case of an appeal. Mr. DiMatteo explained a revised plan would be needed to meet the standards to be voted on by the Board, and the applicant has not provided a revised plan. Mr. Balano felt without a full review of the standards the case would be remanded to the Board in an appeal without final action. The Board did not grant a motion for consideration and asks a Findings of Fact be drafted for review and final Board decision. Ms. Tuveson suggested the statements and comments included should be included in such a document. Mr. DiMatteo explained the ordinance requires board action on a preliminary plan and final plan application. Mr. Balano stated he feels without a final action through findings by the Board may only cause the application to be remanded back to the Board on appeal. Mr.

Emerson explained there is a format for denial of a final plan, but no format for denial of a preliminary plan, and requests the application be continued so that a findings of fact can be developed for the preliminary plan stage as would be done for a final plan.

Brian Rayback, attorney, Pierce Atwood, stated they believe the application is a good one, but if this goes to an appeal it is proper for the Board's decision to be based on the criteria for review and denial. This would provide the Court with the understanding of how the Board came to their decision. If it is found the application meets the standards, except the mineral extraction permit, and the Court determines one is not needed, it saves the need for a remand and contentious review process. Of course, final plan approval will still be needed. If there are multiple standards the applicant does not meet, it is fair to inform the applicant so they will know how to use their resources to file an appeal. The applicant contends no excavation permit is required. The land use ordinance states excavation is allowed for normal excavation operations, incidental to construction activities, for which a valid permit is held. The word 'incidental' is not defined in the ordinance, but the ordinance directs the use of common dictionary definitions. Blacks Law Dictionary defines 'incidental' as *depending upon or pertaining to something else as primary, something necessary, appertaining to or dependent upon another which is termed the principal; something incidental to the main purpose.* The American Heritage Dictionary defines incidental as *something of a subordinate nature.* Whether something is incidental does not depend upon the size itself, but upon its relationship to something else...is it subordinate to the primary purpose of the project. Although the excavation is substantial, it would not be done but for the expansion of the mobile home park. Unlike a pit or a quarry, an estimated 30-40,000 cubic yards of the material will be retained on-site for landscaping, building foundations and roads. The schedule for the excavation will be determined entirely upon the construction schedule of the mobile home park, unlike a commercial operation, whether the price of rock is good or not. No matter how much the plan is amended, excavation will be well in excess of the 100 cubic yard threshold as referenced in the ordinance. 100 cubic yards would allow only 100 feet in on the roadway. This is different from a commercial extraction that is separately regulated. How could permitted uses in the mixed use zone such as a hospital or a commercial parking lot be permitted and developed under this regulation without substantial excavation? Even if the Planning Board disagrees, they have no authority to ignore the Board of Appeals decision that an extraction permit is not required. The Planning Board instructed the applicant to apply for a mineral extraction permit which was then denied by the CEO, and that denial was appealed to the Board of Appeals. The Board of Appeals determined that it had jurisdiction to hear the appeal, that the excavation was incidental, and no permit was required. The ordinance states in Title 16.9.1.2 that excavations may occur only after a permit is issued by the CEO after approval of plans by the Planning Board. This does not grant the Planning Board the authority to hear appeals from the CEO decision as to whether the underlying use is permitted, but rather to regulate the operation of the project itself. The applicant believes the decision by the Board of Appeals is binding upon the Planning Board. The Planning Board cannot enforce a flat prohibition against extraction in this instance because Yankee Commons is protected by the state's mobile home statute. 30A MRS §43583M states *Municipalities must permit mobile home parks to expand and to be developed in a number of environmentally suitable locations in the municipality with reasonable consideration being given to permit existing mobile home parks to expand in their existing locations.* By holding that the applicant cannot excavate in the mixed-use zone the Planning Board is prohibiting the expansion of Yankee Commons. The project cannot be done without excavating a lot of material, and by reading the ordinance the way the Board appears to be doing, prohibits the expansion of this mobile home park and that is not reasonable consideration as required by state statute. Ms. Tuveson noted that reasonable consideration is not a blanket approval, however. Mr. Rayback agreed. Mr. Emerson asked for a summarization.

Mr. Rayback: In summary, the applicant requests the Board reconsider their decision that an extraction permit is required and proceed with consideration of the application under applicable performance standards. The applicant is not asking for a denial, but for continued review so that one way or another a final decision can be made.

Mr. Emerson asked if a public hearing needs to be held. It was the Board's opinion the public hearing was held, with the preliminary plan review continued. This will be confirmed by staff.

Mr. Balano moved to continue the application for 90 days for further discussion following receipt of a draft of a Findings of Fact

Ms. Tuveson seconded

Mr. Melanson suggested the Board go to final plan review prior to drafting a Findings of Fact. Mr. Balano stated the applicant has not moved beyond preliminary plan. Mr. Emerson asked if there is sufficient information available to move to final plan review. Mr. Mylroie stated the Board must decide if a preliminary plan can be approved based on review criteria. Mr. Emerson stated the Board has not had the opportunity to voice their concerns over other issues related to the application and this needs to be reflected in the Findings of Fact. Ms. Tuveson stated she is concerned about the zoning issues. Mr. Balano concurred and suggested that pre-emption is not off the table. Mr. Emerson stated the Findings need to clearly demonstrate where the project does not meet ordinance and where the application does not meet performance criteria.

Motion carried unanimously by all members present

Mr. DiMatteo stated Counsel reviewed the draft Findings before the Board. Mr. Emerson requested that Counsel review the upcoming Findings as well.

Board members agreed to defer Items 5 & 6 to the end of the agenda.

ITEM 5 – Board Member Items: Comments and Discussion

Mr. Emerson reminded members of the July 18 workshop with DPW

ITEM 6 – Town Planner Items: A. Miscellaneous; B. Other – No discussion

NEW BUSINESS

ITEM 7– Badgers Island Marina, Modification to an Approved Plan.

Action: Accept or deny plan application and schedule a site walk and a public hearing. Owner Darren LaPierre, and applicant Mike O'Neil, requests approval to modify a previously approved Site Plan to include a floating bar/restaurant known as the Reef. The property is located at 27 Badgers Island West, Tax Map 1, Lot 30 & 38A, Mixed Use- Badgers Island Zone and Shoreland and Commercial Fisheries/Maritime Uses Overlay Zones.

Mr. DiMatteo stated the Board needs to review for completeness in order to schedule a public hearing. Darren LaPierre

Mr. Emerson stated he understood the proposal is to place a barge at the end of a dock that is outfitted for a restaurant, including parking requirement review. He asked that a revised site plan show access to the proposed restaurant and the proposed parking area. Mr. Melanson noted the applicant must appear before the Port Authority to determine all leases and permits are in order.

Ms. Tuveson moved to accept the application and schedule a site walk and public hearing

Mr. Balano seconded

Motion carried unanimously by all members present

Mr. Melanson stated issues regarding water and waste disposal may fall under Planning Board review.

Scheduling of the site walk was deferred.

ITEM 8 – 68 Chauncey Creek Road Replacement Structure – Shoreland Development Plan Review.

Action: Accept or deny plan application and schedule a public hearing. John Rummmler, owner and applicant, requests approval to replace and expand an existing structure at the property located at 68 Chauncey Creek Road, Tax Map 45, Lot 72, Residential – Suburban Zone and Shoreland Overlay Zone. Applicant was not present.

Mr. Melanson moved to accept and schedule a public hearing
Mr. Balano seconded
Motion carried unanimously by all members present

Scheduling of the public hearing was deferred.

ITEM 9 – Route 236 Commercial Lot Subdivision, Paolucci Realty – Subdivision Preliminary Plan Review.

Action: Review and approve site walk minutes, accept or deny application, and schedule a public hearing. Owner and applicant Peter J. Paul Trustee of Paolucci Realty, is requesting consideration of plans to divide an existing commercial lot located at 93 Route 236, thereby creating a second division within 5 years and requiring subdivision review. The 4.1 acre parcel is located on a portion of Tax Map 28, Lot 14, in the Commercial C-2 Zone. Agent is Tom Harmon, Civil Consultants.

Mr. Harmon asked if the Board understood this proposal is not part of the subdivision and stated the applicant will respond to staff comments in further plan submittals.
Ms. Tuveson moved to accept the application and schedule a public hearing
Mr. Balano seconded
Motion carried unanimously by all members present

Mr. Hall, Conservation Commission, noted the site walk minutes did not include Ms. Wells' name. Mr. Emerson stated the minutes will be amended, but approval will be deferred when there is a full Board complement.

ITEM 10 – Fernald Road Residential Cluster Subdivision, AMP Realty Holdings LLC – Sketch Plan Review.

Action: Review Sketch Plan and determine conformance with Code. Owner and applicant Peter J. Paul Trustee of AMP Realty Trust, is requesting consideration of plans to develop a multi-family cluster subdivision. The approximately 18 acre parcel is located on a portion of Tax Map 28, Lot 14, in Residential Suburban Zone with portions in the Commercial C-2 zone and Shoreland Overlay Zone. Agent is Tom Harmon, Civil Consultants.

Mr. Emerson asked the site walk minutes be deferred.

Mr. Harmon noted two schemes have been provided based on discussions with staff. The parcel supports the proposed 10-11 housing units. Sketches 1 and 1A illustrate 10 units to the rear of the property, away from the noise of Route 236. Sketch 2 illustrates 11 units on a shorter roadway, but is closer to the proposed commercial property and Route 236. He requested a site walk for further review and Board comments. Mr. Emerson asked the two design schemes remain in place through the public hearing process for abutter input. Mr. Harmon stated they could flag the site to illustrate the two schemes. He explained an easement will be needed between the commercial and residential sites for shared stormwater design.

Bill Straub, CMA Engineers, spoke about the frontage along Fernald Road and pedestrian connectivity between the commercial and residential developments. As separate subdivisions, stormwater management, wetland identification, and buffers should be addressed. Mr. Harmon stated the landscaping strip along the commercial lots is not a buffer but an enhancement, as commercial developments do not want to be hidden from Route 236. There will be a buffer to the rear of the commercial lots.

Ms. Tuveson moved to accept the sketch plan and schedule a site walk at a later date.

Mr. Balano seconded

Motion carried unanimously by all members present

Ms. Tuveson moved to adjourn

Mr. Melanson seconded

Motion carried unanimously by all members present

The Kittery Planning Board meeting of July 11, 2013 adjourned at 9:14 p.m.

Submitted by Jan Fisk, Recorder, July 16, 2013